IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent.	)	
vs.	)	APPEAL NO. SC94503
	)	
DEMETRICK TAYLOR,	)	
	)	
Appellant,	)	
	)	

APPEAL TO THE MISSOURI SUPREME COURT,
FROM THE CIRCUIT COURT OF THE CITY OF ST LOUIS
TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 19
THE HONORABLE JIMMIE EDWARDS
JUDGE AT TRIAL AND SENTENCING

APPELLANT'S AMENDED SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes, Bills And Rules

Constitutional Provisions

[1] All RSMO references are to the 2012 versions of RSMO 2000

Other Sources

JURISDICTIONAL STATEMENT

Demetrick Taylor was charged by indictment with one count of possession of a controlled substance pursuant to RSMO §195.202. Mr. Taylor was found guilty by a jury on the count of possession of a controlled substance, before the Honorable Judge Jimmie Edwards, Circuit Judge 22nd Circuit. Mr. Taylor was sentenced to sixteen years in the custody of the Department of Corrections. A motion for new trial and notice of appeal were timely filed with the circuit court. As this appeal involves none of the categories reserved for the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction lay in the Missouri Court of Appeals, and Eastern District. Mo. Const., Art. V., Section 3; § 477.050, RSMo. Following briefing and oral argument, that Court denied relief, and Mr. Taylor requested transfer to this Court. This Court granted transfer.

STATEMENT OF FACTS

Demetrick Taylor was charged with one count of possession of a controlled substance pursuant to RSMO §195.202 for allegedly throwing down a baggie of crack cocaine when standing immediately in front of multiple police officers, with a flash light shining directly on his hands. [TR at 166-9,174, 189, 214, 219][2]. Sometime on around 1:19 am, on January 25, 2012 Demetrick Taylor was standing on a street in north St. Louis. [TR at 161, 174 214]. According to the officers who arrested him, they were on a targeted narcotics patrol at the time they encountered Mr. Taylor. [TR at 160]. They had received numerous calls of increased drug activity in the Wells-Goodfellow neighborhood. *Id*.

The officers claimed they encountered Demetrick on an otherwise deserted street. [TR at 178-9, 230-3]. They thought he was looking in the window of a parked car. They claimed that there had been many car break ins in the area, and that they were suspicious of someone looking into cars because of that fact. [TR at 161,174,214,216] The officers immediately stopped, and shone their mounted spotlight on Mr. Taylor. [TR 162, 216]. Mr. Taylor elected to leave. [TR 163, 186, 217]. He ran across a neighboring lot towards a fence. *Id*. The officers saw no one in the parked car.[TR 178-9 230-3]. They did not remember if the parked car was a truck. [TR 178-9, 203].

[2] For this Brief, the legal file will be cited as LF, the transcript on Appeal as TR.

The officers immediately pursued Mr. Taylor; however, they did not order him to stop. [TR 245]. Neither did they did not tell him he was under arrest. *Id.* Although they were in uniform, it was dark out, and they were reliant on flashlights to see. [TR 167, 189, 219]. The officers pursued Mr. Taylor, on foot, through a vacant lot. [TR 166-8]. They were roughly one to three meters behind him. Mr. Taylor became stuck at a fence surrounding the yard of a home. [TR at 193 220]. He was unable to continue over the fence due to being grabbed by the arm while climbing. [TR 169]. After the officers caught up to Mr. Taylor, grabbed him, and fixed their flash lights directly on him, he allegedly threw a baggie over the fence. [TR 166-9,174, 189, 214, 219].

One of the officers immediately climbed the fence to retrieve the bag. There were, apparently, several vicious dogs in the yard. [TR 245-7]. The officers were concerned the contraband may be destroyed, presumably since in their professional training and experience, dogs may devour baggies of narcotics. [TR 247]. Upon examining the baggie, the officers found that it contained several smaller baggies of a white rocky substance. The rocky substance later tested as cocaine base in the laboratory. [TR 257].

Both officers said they were alone through the entire encounter with Mr. Taylor. [TR 178-9, 230-3]. One stated that after Mr. Taylor was arrested, he saw someone leave a neighboring house, who he spoke to about the car break ins. [TR

200-2, 230-3]. Neither officer discussed seeing two people on the street, or anyone trying to record the arrest. [TR *passim*]. Despite this, there is a record of a vehicle search for a George Ford during their encounter with Mr. Taylor. [TR at 261]. There is also a check for warrants that was run on a George Ford. [TR at 201-3, 230-3, 261].

Mr. Taylor was arrested for trafficking in narcotics and resisting arrest. Mr. Taylor retained counsel, and proceeded to jury trial. At trial, both arresting officers testified as described *supra*. [TR 159-208, 212-254]. On cross examination, Mr. Taylor's attorney attempted to bring out the fact that both officers had previously, and unsuccessfully, attempted to arrest Mr. Taylor. [TR at 195]. The state objected. *Id* The trial court ruled that if Mr. Taylor's attorney did not abandon that line of inquiry, it would allow the state to bring in all of Mr. Taylor's prior criminal convictions, whether or not Mr. Taylor testified, and regardless of if the arresting officers were the same or not. *Id.* The line of inquiry was dropped. [TR 195-6]

Counsel was also unable to call Mr. Taylor's sole witness, Nautica Little. Nautica Little lived across the street and somewhat "catty cornered" from where Mr. Taylor was arrested. Her fiancé, George Ford, was close to Mr. Taylor. [TR 210-12] The night of the arrest, she saw her fiancé come in from outside after a lot of commotion. [TR 210-12, 293-5]. She went outside and saw the police

putting Mr. Taylor on the ground in hand cuffs, while yelling about a gun. [TR at 210-12, 293-5]. Because the police were yelling about a gun while Mr. Taylor was in handcuffs, she attempted to film the arrest using her phone. [TR at 210-12, 293-5]. The police approached her and seized her phone. [TR at 210-12, 293-5]. Despite this, the police testified they encountered no one but Mr. Taylor during the arrest, other than the late arrival of George Ford after Mr. Taylor was fully secured. [TR at 200-2]. The court excluded this evidence as not relevant to the charge of possession of a controlled substance.

At trial the defense did not contest that the rocky substance found was cocaine base [TR 259-60]. The defense stipulated to the qualifications of the laboratory examiner, and waived cross examination. [TR 254-5, 259-60].

After three and a half hours of deliberation, the Jury returned with a guilty verdict. [TR 289]. At sentencing, the trial court noted that it had already decided what sentence to give Mr. Taylor before the sentencing hearing began. [TR 299]. The court noted it always told defendants what sentence they would get before sentencing. [TR 299]. This announcement was made before there was any opportunity to produce mitigating evidence at sentencing.

Mr. Taylor was sentenced to 16 years as a prior and persistent offender and prior and persistent drug offender. [TR 299-301]. This appeal follows. In order to

avoid unnecessary repetition, additional facts may be contained in the argument portion of this brief.

POINTS RELIED ON

First Point Relied On

The trial court erred and abused its discretion when it refused to allow Mr. Taylor to call Nautica Little, his sole intended witness, in that Nautica Little would have offered evidence directly related to the credibility of the officers as to the events of the night of January 25th, 2012, the sole contested issue at trial. Because the trial court excluded Nautica Little, Mr. Taylor was deprived of his rights to due process of law under Mo. Const., Art. I, §§ 10 and 18(a) and U.S. Const., Amends. V and XIV as well as his right to confront witnesses under the United States Constitution, Amend. VI.

Chambers v. Mississippi, 410 U.S. 284 (1973)

State v. Long, 140 S.W.3d 27, 30 (Mo. banc 2004)

Mitchell v. Kardesch, 313 S.W.3d 667 (Mo. 2010)

State v. Sladek, 835 S.W.2d 308, 313 (Mo. 1992)

U.S. Const., Amends. V, VI and XIV;

Mo. Const., Art. I, §§ 10 and 18(a).

Second Point Relied On

The trial court plainly erred when it announced that it had decided on a sentence before any evidence was given at the sentencing hearing, and made it clear that the evidence at the sentencing hearing would and could not change the sentence that was decided on before Mr. Taylor even entered the courtroom for sentencing that day. Because of this early decision, Mr. Taylor had no meaningful opportunity to present mitigating evidence or argue for a lesser sentence. Any opportunity in the context of these remarks was illusory. This was error in that it violated Mr. Taylor's rights to due process of law pursuant to U.S. Const., Amends. V and XIV and Mo. Const., Art. I, §§ 10 and 18(a), and his rights under U.S. Const. Amends. VI and VIII to be assisted by counsel and free of cruel and unusual punishment.

State v. Wise, 879 S.W.2d 494 (Mo.1994)

Green v. U.S., 365 U.S. 301 (1961)

Mo. Const., Article I, Sections 10 and 18(a);

U.S. Const., Amends. V, VI, VIII and XIV;

Argument For Point One

The trial court erred and abused its discretion when it refused to allow Mr. Taylor to call Nautica Little, his sole intended witness, in that Nautica Little would have offered evidence directly related to the credibility of the officers as to the events of the night of January 25th, 2012, the sole contested issue at trial. Because the trial court excluded Nautica Little, Mr. Taylor was deprived of his rights to due process of law under Mo. Const., Art. I, §§ 10 and 18(a) and U.S. Const., Amends. V and XIV as well as his right to confront witnesses under the United States Constitution, Amend. VI.

Standard of Review

A trial court's decision to exclude a witness is typically reviewed for abuse of discretion. This court will give substantial deference to the decision of the trial court unless an abuse of discretion is shown. An abuse of discretion can include denying the defendant the ability to mount a defense.

It is the duty of the movant to make an offer of proof as to what the excluded witness would have testified to to allow appellate review. *State v. Duncan*, 385 S.W.3d 505, 507 (Mo.App. S.D. 2012) That was done in this case. Mr. Taylor attempted to call Ms. Little at trial. This was denied by the trial court after an offer of proof by defense counsel. The issue was again raised in the motion for

new trial, which was denied by the trial court. [Tr at 210-12, 293-5] There was a sufficient showing as to what the testimony would have been through these two arguments to allow the appellate court meaningful review of what the witness would have testified to and the relevance to the case at bar.

Argument

Demetrick Taylor had one available defense at trial- that the two police officers lied about the events of that night. Given the facts alleged, there were no realistic alternative defenses. Identity was not an issue- the officers knew Mr. Taylor, and knew who he was even before they chased him away from the parked vehicle. [TR at 161, 215]. Mr. Taylor was alleged to have dropped a bag of drugs directly in front of the officers. [TR at 166-9, 214]. Supposedly, he did this while clearly visible, after the officers had time to catch up to him and bring their flash lights firmly to bear on Mr. Taylor's hands. *Id.* Alternative defenses are few and far between in this case. To show that the officers were not truthful about the events of that night, Mr. Taylor intended to rely on two complimentary strategies- cross examination by counsel and the testimony of Nautica Little.

Ms. Little did not see the alleged drug drop, but she did see Mr. Taylor being brought into custody, as well as the state of the street that night. [TR at 210-12, 293-5] Despite the officers' assertion that the street was empty, she saw her fiancé come in from outside at around the same time that Mr. Taylor was arrested.

Although she did not know he was speaking with Mr. Taylor other than through her fiancé's hearsay statement on coming inside, she certainly knew her fiancé was outside. *Id.* Ms. Little also heard the commotion outside, and went to see what was going on. [TR 211]. She saw the two officers yelling about a gun, while Mr. Taylor was on the ground in hand cuffs. [TR 211]. Due to the fact that the officers were shouting about a gun while Mr. Taylor was on the ground, Mr. Taylor attempted to record the incident on her phone. *Id.* The officers approached her, and ordered her to stop. *Id.* They seized her phone. *Id.* They then returned to bringing Mr. Taylor into custody.

Ms. Little was available, and ready to testify at trial. Although trial counsel did not bring Ms. Little into the court room to make a testimonial offer of proof, he did state that she was in the hall. [TR at 210]. He read her statement to his investigator as an offer of proof, and informed the court of what she would be able to testify to at trial. [TR 210-12, 293-5, Defendant's Sentencing exhibit A] The state in turn moved that her testimony was irrelevant due to the fact that she had not seen the actual alleged drug toss. The state never addressed the issue of the overall credibility of the officers as to what occurred that night, including their statements that they never mentioned or suspected a gun, and that no one else was on the street that evening until after Mr. Taylor was secure. [TR 211-2] The State

did not address the fact that neither officer mentioned a female, any other second bystander, or taking a phone. *Id*.

Further, all of this testimony occurred in a jurisdiction where, unfortunately, one would expect the jury pool to know that police fabrication is a potential issue in any criminal trial, even if it was never injected by the defendant. St. Louis, unfortunately, has a well publicized history for police misconduct such as planting contraband. Although this is a crime that often eludes detection, St. Louis has seen multiple officers receive federal convictions for official misconduct, as well as other media attention for non-indicted officers planting narcotics- even when their own dashboard cameras were on and recording.[3] A jury of St. Louis citizens

[3] *See. e.g*. the following articles from the St. Louis Post Dispatch for the some of the highest profile City specific cases: *After police discredited, drug charges against St. Louis man are dropped,* (December 2011), http://www.stltoday.com/news/local/metro/after-police-discredited-drug-charges-against-st-louis-man-are/article_4d178e22-30eb-11e1-b0bb-0019bb30f31a.html; *Video of St. Louis drug arrest stirs controversy*, (October 2013), http://www.stltoday.com/news/local/crime-and-courts/video-of-st-louis-drug-arrest-stirs-controversy/article_0c326fe1-cbe5-5aea-ac37-1a1b49df3528.html, *Former St. Louis officers allege 'witch hunt',* (January 2010) http://www.stltoday.com/news/former-st-louis-officers-allege-witch-

is naturally aware of the fact that their police force has a checkered history. Although a fair juror certainly would not inherently disbelieve a police officer purely by being a police officer, any jury exists within this overarching context.

Ms. Little should have been allowed to testify because she would testify to her direct observation of the contested events.

There was one issue for the jury to decide in in Demetrick Taylor's trial- were two police officers lying about the events of January 25, 2012. Mr. Taylor had already conceded that the substance in evidence was a controlled substance, to wit cocaine base. Yet the Jury spent three and a half hours deliberating, trying to decide whether or not they believed two police officers. Despite this, the trial court ruled that testimony by an eyewitness who viewed a portion of Mr. Taylor's interaction with the police that night was not relevant. This was an abuse of discretion.

Ms. Little's testimony was relevant to Mr. Taylor's case. Relevant evidence is defined as:

> "Evidence is "logically relevant" if such evidence tends to make the existence of any material fact more or less probable than it would be without the evidence. This is a very low-level test that is easily met…Evidence that is logically relevant, however, is not necessarily admissible; to be admitted it

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must also be "legally relevant." Legal relevance involves a process through which the probative value of the evidence (its usefulness) is weighed against the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence (the cost of the evidence)"

State v. Sladek, 835 S.W.2d 308, 313 (Mo. 1992)(Thomas concurring).

Certain types of evidence have historically been found to be directly relevant to the case. These include: evidence that included direct observation of the crime and surrounding circumstances, evidence of bias or motive to lie on the part of a witness, evidence of unrelated specific acts of dishonesty where credibility is at issue. *See e.g.*, *State v. JLS*, 259 S.W.3d 39 (Mo.App. W.D. 2008), *State v. Davidson,* 107 S.W.3d 306 (Mo.App W.D. 2003), *State v. Sladek*, 835 S.W.2d 308, 313 (Mo. 1992). Although the court must still go through the prejudice analysis it also must keep in mind that it has a duty to the defendant to ensure he or she receives a fair trial. The court must allow a defendant to present a meaningful defense. *Chambers v. Mississippi*, 410 U.S. 284, 294-95(1973).

In this case, Ms. Little observed part of Mr. Taylor's interaction with the police. [TR 210-12, 293-5]. She saw Mr. Taylor on the ground on the ground in hand cuffs. She saw the officers yelling about a gun. [TR 210-12, 293-5]. She saw her fiancé come inside from the street. [TR 210-12, 293-5]. Despite this, the

officers in their testimony denied seeing any gun, or taking Mr Taylor to the ground. They stated the street was empty during their interaction with Mr. Taylor. [TR 178-9, 230-3].

Further, Ms. Little said that she was concerned about what she was watching when she saw the officers yelling about a gun while Mr. Taylor was in handcuffs on the ground. [TR 210-12, 293-5] She attempted to film the police and Mr. Taylor, because she was worried that there was something wrong with this interaction. [TR 210-12, 293-5] The Police responded to this by approaching Ms. Little, demanding she stop filming, and took her phone. *Id.*

Missouri Courts have long ruled that attempting to destroy evidence, or other evasive behavior is relevant evidence of consciousness of guilt. See e.g. *State v. Mack*, 66 S.W.3d 706, 709 (Mo. 2002)(in the context of reasonable suspicion analysis); *State v. Davidson,* 107 S.W.3d 306 (Mo.App W.D. 2003) (attempting to convince witness not to testify).Here Ms. Little would have testified that the officer's reaction to being filmed by a law abiding citizen was to demand that she stop filming and to seize her phone. [TR 210-12, 293-5]

Ms Little's testimony goes directly to what happened between the police and Mr. Taylor the night of January 25, 2012. They are her direct observations of the contested series of events. This is not a mere collateral issue, or some unrelated distant act showing a general character for dishonesty on the part of the police, or

prior specific acts of dishonesty—this goes to the heart of what happened that night, at that arrest. An issue is not collateral if it is a 'crucial issue directly in controversy.' *State v. Long*, 140 S.W.3d 27, 30 (Mo. banc 2004).

Yet, Mr. Taylor was not permitted to bring in direct evidence that the events of January 25, 2012 did not match the version of events told by the testifying officers. He wasn't allowed to bring in evidence that the officers tried to avoid being observed or filmed by a private citizen who was not interfering in their duties. Demetrick was merely trying to elicit direct evidence of what really occurred during his interaction with the officers. He did not try to bring in information about the department's poor character, or the other well publicized incidents of misconduct- merely the evidence pertaining only to his case, the events of that night, and the officers' conduct at that time. [TR *passim*]

Even if this was assumed to be testimony on a separate issue of dishonesty, Ms. Little's testimony still should have been admitted.

Even if this were to be taken as a separate act of dishonesty by the police, rather than observation of the event in controversy, it was an abuse of discretion to exclude Ms. Little. This is a case where the witnesses' credibility is a crucial and central issue of the case. Missouri Courts, both in the civil and criminal context, have ruled that specific acts of dishonesty are admissible where the witness credibility is central to the case, even where they would otherwise be considered

collateral. *Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. 2010); *Long*, 140 S.W.3d at 30.

An example of this is *Mitchell v. Kardesch*, 313 S.W.3d 667, 379-81 (Mo. 2010) wherein the credibility of a doctor in a wrongful death suit was fundamental to deciding the case. The court ruled that even though it usually would have been considered mere extrinsic evidence of a collateral issue, the doctor's prior acts of lying about having his medical license suspended could be brought into evidence. *Id*. This was because "Where, as in this case, a witness' credibility is a key factor in determining guilt or acquittal, excluding extrinsic evidence of the witnesses' prior false allegations deprives the fact-finder of evidence that is highly relevant to a crucial issue directly in controversy; the credibility of the witness." *Mitchell*, 313 S.W.3d at 380, quoting the criminal case, *Long,* 140 S.W.3d at 30.

Similarly in the criminal context even the unrelated prior specific acts of dishonesty of a witness can be brought into evidence where they go to a crucial aspect of the case. This includes evidence of prior false accusations, as well as bias, prejudice and other motive to lie. *Long,* 140 S.W.3d at 30; *State v. Solven*, 371 S.W.2d 328 (Mo. banc 1963); *Kuehne v. State*, 107 S.W.3d 285 (Mo.App. W.D. 2003).

Similarly, in the case at bar, Mr. Taylor's case hinges on credibility. No one contests that there were drugs, and that the drugs in question consisted of small

amounts of cocaine base. The only contested fact is if Mr. Taylor threw the bag of drugs to the ground, or if it was planted by police officers. The crucial factor in deciding which version of events is true is the credibility of the testifying officers. By not allowing Mr. Taylor to bring in a witness who directly contradicts several aspects of the officer's versions of events that night, Mr. Taylor was denied his fundamental rights to due process of law, as well as confrontation. The evidence he wished to admit was narrowly tailored- he did not seek to introduce or reiterate the general troubles of the St. Louis police department with corruption, nor did he fish through the officer's personnel files looking for minor misdeeds. [TR *passim*]. He merely attempted to bring in evidence that that night, two specific officers gave a version of events that was not true.

Nor can it be said that this is a case where the proffered testimony would make no difference in the outcome. The jury in Mr. Taylor's case was out for **three and a half hours**, in a case where there were only two elements they had to find beyond a reasonable doubt. [TR at 289]. One of those elements was uncontested. [TR at 257]. Possession of a controlled substance only requires showing possession, and a controlled substance. RSMO 195.202. No attack was made on the fact that the substance in this case was a controlled substance, meaning the jury spent three and a half hours deciding if they found the police officers believable, even without Nautica little's testimony. [TR at 289, 254-7].

The ruling to exclude Ms. Little is clearly against the logic of these circumstances, and was arbitrary and unreasonable, denying Mr. Taylor a fair trial. For the above reasons Mr. Taylor requests this court remand this case for a fair trial wherein Mr. Taylor will be able to call Nautica Little as a witness in his own defense, or such other relief as this Court sees fit.

Argument for Point Two

The trial court plainly erred when it announced that it had decided on a sentence before any evidence was given at the sentencing hearing, and made it clear that the evidence at the sentencing hearing would and could not change the sentence that was decided on before Mr. Taylor even entered the courtroom for sentencing that day. Because of this early decision, Mr. Taylor had no meaningful opportunity to present mitigating evidence or argue for a lesser sentence. Any opportunity in the context of these remarks was illusory. This was error in that it violated Mr. Taylor's rights to due process of law pursuant to U.S. Const., Amends. V and XIV and Mo. Const., Art. I, §§ 10 and 18(a), and his rights under U.S. Const. Amends. VI and VIII to be assisted by counsel and free of cruel and unusual punishment.

This error was not persevered at the trial level and so appellant requests that this court review this claim pursuant to Rule 30.20 for plain error.

Argument

Demetrick Taylor was told the sentence that he would receive before he even began his sentencing hearing. His lawyer had not presented evidence at the time his sentence was decided. His motion for new trial had not been argued

when his sentence was decided. Mr. Taylor had not been given any opportunity to speak at the time his sentence was decided. Although all of these things were eventually allowed by the Court, the Court made it clear: They were useless. The Court stated that it always told defendants what they were going to be sentenced to before the sentencing hearing, and that no defendants were ever surprised, because they always received the sentence they were told they were going to receive. In other words, any sentencing advocacy at the sentencing hearing was illusory.

A defendant has a right to a full fair, competently litigated sentencing hearing. Deciding the outcome before the hearing- and announcing that fact on the record- not only denied Mr. Taylor his right to due process of law at sentencing, but also is the sort of error that can undermine confidence in the court system itself. This is not only a manifest injustice for Mr. Taylor, but a symptom of a systematic pattern of denial of due process to criminal defendants awaiting sentencing hearing.

Due process considerations extend to sentencing. A defendant has a right to a fair hearing, with the effective assistance of counsel. Missouri has repeatedly recognized this fact in the post-conviction context. *See e.g. Hunter v. State*, 461 S.W.2d 873 (Mo 1971) (discussing potential for failure to mitigate claim in robbery, but no ineffective assistance found); See e.g. *Johnson v. State*, 388 S.W.3d 159, 165 (Mo. 2012). Sentencing is a critical phase of a criminal

proceeding since it decides how long an individual will have their liberty restrained, and how severely. Missouri courts frequently deal with due process claims regarding sentencing error. See e.g. Missouri Supreme Court rules 24.035 and 29.15; *Spicer v. State*, 300 S.W.3d 249 (Mo.App. W.D. 2009)(discussing a due process claim regarding the non-binding nature of Missouri Sentencing recommendation reports).

The ethical duty of the judge is to listen to all of the evidence presented at the sentencing hearing, then to tailor an appropriate sentence. Missouri Rules of Judicial Conduct Rule 2.2-6 ("A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."). Mr. Taylor was sentenced by a judge who admitted, in no uncertain terms, that he does not follow this cannon. In fact when Mr. Taylor indicated he thought there could be a change in the sentence the judge had decided following advocacy at his sentencing hearing, the following discussion took place

> **THE COURT**: All right. I'm sure Mr. Taaffe explained to you kind of how I operate, and you already know what sentence you are going to get even before I pronounce it. You already know that, don't you?
>
> **THE DEFENDANT**: No, sir.
>
> **THE COURT**: Mr. Taylor, you've been around too long from that. I expect that from my juveniles. I never sentence a defendant without telling the

lawyer what I'm going to do beforehand, and I tell the lawyer to always come and tell you so you sit in that box all morning you know exactly what sentence I'm going to give you because he told you, didn't he? Didn't he tell you?

THE DEFENDANT: He told me what you was leaning towards. He didn't say --

THE COURT: All right. So he already told you what I was going to do and so that's -- so it's not a surprise when I sentence you. I just, you know, most people that come in here, they think that the defendant is surprised about the sentence, but the defendants are never surprised because I always tell you beforehand. Is there anything you want to state?

THE DEFENDANT: No, sir.

[Tr at 300-1].

It is clear in this exchange that nothing defendant or counsel would say would alter the sentence that was to be imposed. The same mitigation evidence a lawyer is required to bring as a zealous advocate would, very literally, be useless. This was not a sentence the judge was considering- it is one he had already firmly decided on, by his admission. Equally by his admission, such pre-decision was how he proceeded in **all** cases. No one before the court received, or presumably

receives, a real sentencing hearing. This is a manifest injustice impacting fundamental rights- not just for Mr. Taylor, but for anyone else before the Court..

Not only does this procedure leave Mr. Taylor with no meaningful opportunity to be heard, it also leaves other defendants who may see the proceedings in a position where they know that their mitigation evidence will be equally useless. This not only damages Mr. Taylor's rights to due process, it damages the trustworthiness of the court system.

These statements are further problematic in that they indicate that the court is not following rule 29.07 and not truly granting allocution to the defendant in any criminal case. Reviewing the exchange between the court and Mr. Taylor it is clear that there is no real opportunity for the defendant to make himself heard. He is going to get the sentence he was going to get- like everyone else who comes before the court. [TR at 299]. Missouri, as well as the Federal government, [4]have recognized allocution as a right of the defendant. See, *State v. Wise*, 879 S.W.2d 494,516 (Mo.1994) (overruled on other grounds- denial of allocution likely unconstitutional in Missouri); *Green v. U.S.*, 365 U.S. 301,304 (1961) (Counsel arguing is no substitute for defendant's right to speak for himself if he so wishes

[4] In limited circumstances- there is no federal constitutional right, but where state law grants allocution, the state must allow the defendant personally to be heard. *Green v. U.S.*, 365 U.S. 301,304 (1961)

where law grants allocution). Rule 29.07(b)(1) places an affirmative burden on the court to inform defendants of the verdict and to offer defendants the right to speak before sentencing. Here there was no real opportunity to speak- Mr, Taylor's sentence was decided before his hearing began.

Further, the fact that Mr. Taylor stated he had nothing to say should not be taken as a waiver of claims. [Tr at 300-1]. Mr. Taylor was facing a life sentence, from a judge who just stated that his mind was made up in no uncertain terms as to what the sentence would be. A rational litigant, through counsel or his own words, would not choose that particular time to raise any complaints about the proceedings, lest they risk retaliation.

Demetrick Taylor for the above reasons requests this Court remand his case to the circuit court to allow him a meaningful sentencing hearing, or such other relief as this court sees fit.

CONCLUSION

WHEREFORE, based on the argument as set forth in this brief, appellant Demetrick Taylor respectfully requests this Honorable Court reverse his conviction and remand this case for a new trial, a new sentencing hearing, or such other relief as this Court sees fit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 363, I hereby certify that on this 2nd day of February 2014 a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, jennifer.rodewald@ago.gov, via the Missouri e-filing system, care of MS Jennifer Rodewald, Office of the Attorney General.

/s/ Amy E. Lowe_____
Amy E. Lowe

CERTIFICATE OF COMPLIANCE

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